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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

ASARCO INCORPORATED,
Petitioner,
v.
LOUISIANA-PACIFIC CORPORATION, et al.,
Respondents.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF ALASKA MINERS ASSOC., ARIZONA MINING ASSOC., CALIFORNIA MINING ASSOC., THE COLORADO MINING ASSOC., EASTERN OREGON MINING ASSOC., IDAHO MINING ASSOC., MONTANA MINING ASSOC., NEW MEXICO MINING ASSOC., NORTHWEST MINING ASSOC., OREGON INDEPENDENT MINERS, SOUTH DAKOTA MINING ASSOC., UTAH MINING ASSOC., AND WYOMING MINING ASSOC. IN SUPPORT OF ASARCO INCORPORATED'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

***AMICI CURIAE* BRIEF**

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Attorneys for Amici

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A. Consent To File Brief Of Amici Curiae Has Been Denied.

Alaska Miners Associations, Arizona Mining Association, California Mining Association, The Colorado Mining Association, Eastern Oregon Mining Association, Idaho Mining Association, Montana Mining Association, New Mexico Mining Association, Northwest Mining Association, Oregon Independent Miners, South Dakota Mining Association, and the Utah Mining Association by and through their attorney and counsel of record, Gregory W. Duncan, move this Court for leave to file an amici curiae brief.

This motion is necessary because Amici have attempted to gain the consent of the parties and have been denied the consent of all parties except ASARCO INCORPORATED, Petitioner, who has given consent.

Consent was denied by Louisiana-Pacific Corporation, Port of Tacoma, Murray Pacific Corp., Cascade Timber Co., William B. Fjetland, B & L Trucking, Eagle Trucking, Executive Bark, Wasser & Winters Co., Portac, Inc., Industrial Mineral Products, Inc., and the Environmental and Natural Resources Division of the Department of Justice.

Denial of consent was received in the form of a facsimile letter from Jeffrey W. Leppo, Bogle and Gates, Counsel for the Port of Tacoma, which states:

> We are writing as counsel for the Port of Tacoma in response to your letter of November 26, 1994. Your letter requests consent to the filing of an amici curiae brief on behalf of the various mining associations. We have consulted with counsel for all the respondents in this matter, each of whom received a similar letter requesting consent.
>
> The Port and other respondents appreciate the courtesy of your request, but do <u>not</u> consent to the filing of an amici curiae brief in support of Asarco's writ of certiorari.

B. The Brief Of Amici Raises Important Issues Not Addressed In The Petition.

Amici are a diverse group of state and regional mining associations, representing mining and mineral processing interests predominately located in the western United States. With thousands of members, Amici represent all aspects of the mining industry -- from entrepreneurial exploration ventures to large-scale mines and the numerous and various processors of mineral products. Amici bring a broad, industry-wide perspective to the issues presented in this case, which is unavailable to the parties.

Amici submit this brief because the resolution of the issues presented by this case -- whether CERCLA's liability provisions extend to so-called "Bevill Waste" and whether good faith recycling of mining and mineral processing wastes will give rise to CERCLA liability -- will have profound and long-lasting effects on the mining industry and on the environment. Amici's members thus have a vital interest in the outcome of this case.

Specifically, Amici address the following issues:

1. The importance of the mining industry: Amici explain why this industry is both a unique and essential industry and provide background on its size relative to the economy as a whole.

2. Waste generation issues in the mining industry: Amici explain waste generation in the mining industry and, in particular, the high volume/low hazard characteristics of mining and mineral processing waste.

3. The industry-wide effects of the Ninth Circuit's decision: With the broad perspective provided by the diverse membership of Amici, representing all aspects of the mining industry, Amici explain the adverse consequences the industry will suffer if the Ninth Circuit's decision is allowed to stand. Specifically, Amici describe how the Ninth Circuit's decision undermines the environmental policies reflected in state and federal environmental laws. Amici also explain how the decision undermines incentives to undertake remining and

reprocessing efforts -- efforts that are both environmentally and economically beneficial.

4. State-regulation: Amici also describe the state regulatory programs already governing the mining industry.

Amici believe that it is important for the Court to consider all these issues in resolving the petition for a writ of certiorari and thus ask this Court for leave to file the attached brief of Amici Curiae.

Respectfully submitted this _____ day of December, 1994.

By: _____

Gregory W. Duncan
Counsel of Record

Harrison, Loendorf & Poston
Attorneys for Amici

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STATEMENT OF INTEREST

Amici submit this brief in support of the petition for a writ of certiorari. Amici are a diverse group of state and regional mining associations, representing mining and mineral processing interests predominately located in the West. With thousands of members, Amici represent all aspects of the mining industry -- from entrepreneurial exploration ventures to large-scale mines and the numerous and various processors of mineral products.

Amici submit this brief because the resolution of the issues presented by this case -- whether CERCLA's liability provisions extend to so-called "Bevill Waste" and whether good faith recycling of mining and mineral processing wastes will give rise to CERCLA liability -- will have profound and long-lasting effects on the mining industry and on the environment.

Amici include the following organizations:

Alaska Miners Association: Founded in 1939, the Alaska Miners Association has approximately 1,000 members. Its members include individual prospectors, family-run mining operations, geologists and other professionals, and large, international mining organizations.

Arizona Mining Association: The Arizona Mining Association represents Arizona's mining and metallurgical industries.

California Mining Association: The California Mining Association represents California's leading mineral products producers. The 1993 value of nonfuel mineral production in California was estimated to be $2.28 billion.

The Colorado Mining Association: Established in 1876, The Colorado Mining Association represents 113 companies and approximately 1,000 individuals. The Association is composed of both small and large enterprises engaged in all aspects of the mining industry.

Eastern Oregon Mining Association: With a membership numbering approximately 500, the Eastern Oregon Mining

Association represents small, independent miners in Oregon, Washington, Nevada and Idaho.

Idaho Mining Association: The Idaho Mining Association represents 14 mining companies in Idaho. Mineral production and processing in Idaho in 1992 was valued at $778 million. The Association also represents nine mineral exploration companies and 54 companies that provide supplies and services to Idaho's mining industry.

Montana Mining Association: With approximately 600 members, the Montana Mining Association represents every major producer of hardrock minerals in Montana. Members include exploration and mining firms, individual prospectors, and others.

New Mexico Mining Association: The New Mexico Mining Association has approximately 300 members, representing all aspects of the New Mexico mining industry.

Northwest Mining Association: The Northwest Mining Association was formed in 1895 in Spokane, Washington. Its membership numbers more than 2,800. The Association is international in scope, with most of its members residing in the Western United States.

Oregon Independent Miners: This mining association represents 14 mining organizations in Oregon and Washington, with a total membership of approximately 2,500. Members range from small, independent miners to large mining companies.

South Dakota Mining Association: Formerly the Black Hills Mining Association, the South Dakota Mining Association represents South Dakota's mining industry. It has almost 200 members.

Utah Mining Association: The Utah Mining Association has 129 members, representing a broad cross-section of the mining industry. The value of mineral production in Utah in 1993 was approximately $1.86 billion.

Wyoming Mining Association: Founded in 1955, the Wyoming Mining Association represents Wyoming's mining industry, which employs thousands of people in the mining and processing of bentonite, coal, gold, trona and uranium.

SUMMARY OF ARGUMENT

As Congress recognized when it enacted the Bevill Amendment, from an environmental perspective the mining and mineral processing industry is unlike other industry because it produces high volumes of low hazard waste. For example, the production of one ton of copper ore can generate as much as 500 tons of waste; for gold, the ratio of waste to ore is 350,000:1. Mining wastes, unlike many production-related wastes, are almost entirely nonhazardous. This conclusion is not merely the mining industry's assertion; it is based on EPA's Report to Congress on mining wastes, which was mandated by the Bevill Amendment. The study found that less than five percent of mining waste could be classified as hazardous under EPA standards. EPA, *Wastes from the Extraction and Beneficiation of Metallic Ores, Phosphate Rock, Asbestos, Overburden from Uranium Mining, and Oil Shale* ES-12 (December 1985) (hereinafter "1985 EPA Report to Congress"). In a later determination, EPA found that less than one percent of these wastes would fail EPA's toxicity test. *See* Regulatory Determination for Wastes from the Extraction and Beneficiation of Ores and Minerals, 51 Fed. Reg. 24496, 24498 (July 3, 1986). This result should come as no surprise: much of the "waste" produced by mining is simply excavated rock, clay and dirt.

The Ninth Circuit's decision in this case fails not only to comport with Congressional intent but also fails to recognize these unique "high volume, low hazard" characteristics – the characteristics that underlaid Congress' decision to exempt these materials from regulation as RCRA hazardous wastes and from CERCLA. The court ignored the careful balance struck by Congress when it passed the Bevill Amendment. The Ninth Circuit's willingness to ignore Congressional intent – indeed its

willingness to nullify the Bevill Amendment as applied to CERCLA[1] -- will have far-reaching adverse consequences in the mining industry. Moreover, the Ninth Circuit's decision ignores the fact that states already have in place comprehensive mine waste regulatory programs. These programs are tailored to the unique environmental considerations present in each affected state; federalizing this law by imposing CERCLA liability will undermine states' efforts in this area.

The court's ruling, if allowed to stand, will also undermine the policies reflected in the federal environmental statutes. This point is best illustrated by the effect the court's decision will have on industry incentives to engage in remining of existing sites and reprocessing of existing mine waste. As explained below, remining and reprocessing wastes at existing sites not only reduces those risks that are posed by mining waste but also diminishes the need to open new mines in otherwise unspoiled territory. Yet, under the Ninth Circuit's ruling, mining companies now face grave and often unquantifiable risks if they undertake remining or reprocessing efforts -- risks that make it highly unlikely that they will engage in these environmentally beneficial activities. The court's ruling not only conflicts with the meaning and purpose of the Bevill Amendment as applied to CERCLA, but also undermines a central purpose of the federal environmental regulatory structure, *i.e.*, to encourage environmentally sound business practices.

The Ninth Circuit's ruling does not just create perverse incentives with respect to remining; it also introduces substantial economic uncertainty in the mining industry. Unlike many business risks, the risks associated with CERCLA liability are unusually difficult to quantify. That problem is especially acute where, as here, the industry inevitably produces enormous

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[1] The Petition for a Writ of Certiorari explains in detail why the Ninth Circuit's ruling nullifies the Bevill Amendment as it is incorporated in CERCLA. Amici agree with Petitioner's analysis of the issue and will not repeat it here.

volumes of waste. A misstep or miscalculation regarding liability for mine waste could be extremely costly. Faced with the difficult task of quantifying these risks and the potentially catastrophic effects of a misjudgment, mining enterprises will err on the side of caution, thus foregoing otherwise economically and environmentally sound activities. In other words, in the face of diminishing ore qualities and uncertain yet potentially enormous liability, the domestic mining industry will often choose not to mine a new site rather than risk CERCLA liability.

ARGUMENT

A. The Mining Industry And Mine Waste Generation.

1. Mining Is An Essential Industry.

There is little dispute about the importance of the mining industry. As one scholar recently explained, "[m]ining is essential for modern civilization. Without it, there would be no automobiles or televisions, no telephones or x-ray machines, no skyscrapers or computers." John E. Tilton, *Mining Waste and the Polluter-Pays Principle in the United States, in Mining and the Environment* 57, 57 (Roderick G. Eggert ed., 1994). Professor Kesler of the University of Michigan notes:

> Our civilization is based on mineral resources. . . . Large-scale production of food for urban populations depends on mineral fertilizers. The buildings in which we live and work are made almost entirely of mineral material that was extracted from Earth. Although a return to Walden Pond might free some of us from mineral dependency, most of Earth's 5.3 billion inhabitants are actively seeking the comforts that mineral consumption can provide.

Stephen E. Kesler, *Mineral Resources, Economics & the Environment* 1 (1994).

The domestic mining industry has long played an important role in the national and international affairs of this country. A

healthy domestic mining industry, for example, is essential to national security. *See* Roderick G. Eggert, *National Security & Recent Trends in U.S. Mining & Mineral Processing*, 10 Materials & Society 113 (1986). It also plays an important role in the U.S. economy. In 1992, the estimated value of domestic mineral raw materials produced by the mining industry was $32 billion. Bureau of Mines, *Mineral Commodity Summaries* 2 (1993); *see also* Bureau of Mines, *1 Minerals Yearbook 1992* 6 (1993). When processed, these minerals and metals had an estimated value of $310 billion -- which accounted for more than five percent of the U.S. Gross Domestic Product. Bureau of Mines, *Mineral Commodity Summaries* 2 (1993).[2] The mining industry employed more than 1.9 million people in 1992, operating at 79 percent of capacity. *Id.* at 5, 7.

Mining also plays a significant role in maintaining the trade balance. In 1992, the estimated value of U.S. exports of mineral raw and processed materials was $37 billion. Bureau of Mines, *Mineral Commodity Summaries* 2 (1993).

2. The Nature Of Mining And Mineral Processing Makes The Production Of Large Waste Volumes Inevitable.

The domestic mining industry now faces substantial challenges. New reserves are becoming more difficult to locate and, once located, more difficult to mine. At the same time, overall ore qualities have declined, increasing costs while reducing productivity. One persistent challenge, though, has been the handling and processing of mining and mineral processing wastes.

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[2] When measured against Gross National Product (as opposed to Gross Domestic Product), the percentage increases. According to EPA, the mining industry accounted for more than nine percent of GNP in 1983. 1985 EPA Report to Congress 2-1.

As EPA itself has recognized, the mining industry's generation of large waste volumes is both unique and inevitable:

> The fact that most of the material handled in mining is waste and not marketable product distinguishes mining from many other process industries where waste materials make up a relatively small portion of the materials used to produce a final product. Consequently, some of the larger mining operations handle more material and generate more waste than many entire industries.

51 Fed. Reg. 24496, 24497-98 (statement by EPA); *see also* 1985 EPA Report to Congress 2-10 ("The fact that the materials handled consist largely of waste or unusable materials distinguishes these mining industry segments from many other process industries . . . .").

EPA has also recognized that the nature of the mining process -- as opposed to any specific practices of the industry -- makes large-scale waste generation inevitable. *See, e.g.*, EPA, *Mining Waste Management* 3 (September 1991) (acknowledging that there is little that can be done to reduce the quantity of mine waste generated). In general, mineral deposits within 100 meters of the surface are extracted from open pit mines and deeper deposits are extracted from underground mines. Open pit mines account for approximately 90 percent of the ore mined in the United States. Stephen E. Kesler, *Mineral Resources, Economics & the Environment* 68 (1994). The development of an open pit mine requires removal of overburden, the worthless rock that both overlies and is mixed with the ore. A large copper facility, for example, may handle more than 10 million tons of material per year, only 30 percent of which is marketable ore. 1985 EPA Report to Congress 6-3, 6-4. Even mining for iron, the most common metal, produces six times more waste than ore. At the extreme, the ratio of waste to marketable ore in gold mining is, as shown in the following table, extraordinarily high.

Table 1.
Ratios of Mining Waste to Marketable Ore

Copper	420:1
Gold	350,000:1
Iron	6:1
Lead	19:1
Silver	7,500:1
Uranium	6,900:1
Zinc	27:1

(1985 EPA Report to Congress, Table 2-5)

The mining and mineral processing industry thus inevitably generates substantial total waste volumes. Since 1910, the industry has generated more than 50 billion metric tons of waste, *see* 1985 EPA Report to Congress 2-18, and currently produces approximately 2 billion tons of waste per year. Bureau of Mines, *Mineral Commodity Summaries* 6 (1993); *see also* EPA, *A Study of Waste Generation, Treatment & Disposal in the Metals Mining Industry* 4 (EPA Midwest Research Unit 1976). To put this annual amount in perspective, the total municipal solid waste generated in the country amounts to only 180 million tons -- less than 10 percent of the mine waste total. Bureau of Mines, *1 Mineral Yearbook 1992* 814 (1993). The chart below summarizes annual solid waste generation in the United States:[3]

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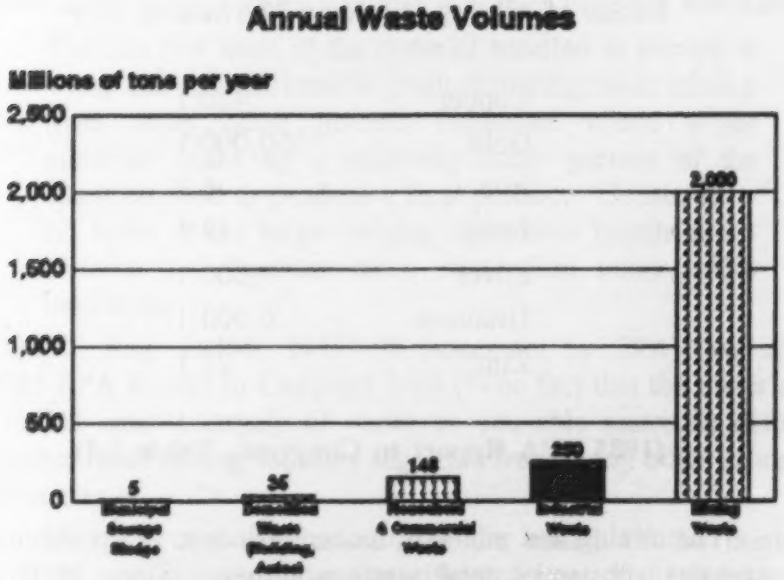
[3] Figures are based on 1985 EPA Report to Congress 6-3, Stephen E. Kesler, *Mineral Resources, Economics & the Environment* 5 (1994), and Bureau of Mines, *Mineral Commodity Summaries* 6 (1993).



3. Mining And Mineral Processing Waste Is Low Hazard Waste.

Mining waste is unique not only for its high volume; it is also low hazard waste. Indeed, it was the "high volume, low hazard" characteristics of mine waste that led Congress to enact the Bevill Amendment. *See, e.g.*, 126 Cong. Rec. 3361 (daily ed. Feb. 20, 1980) (statement of Rep. Bevill). Most mining waste is harmless overburden, consisting of rocks, clay and dirt. In recognition of this, EPA has permanently exempted mining extraction and beneficiation waste from regulation under the strict Subtitle C hazardous waste provisions of the Resource Conservation and Recovery Act. 51 Fed. Reg. 24496.

EPA's regulatory determination was based in large part on its finding in its comprehensive mining waste study that less than five percent of all extraction and beneficiation wastes could be classified as hazardous. 1985 EPA Report to Congress ES-

12.[4] Although mining waste contains trace levels of common heavy metals present in the earth's crust, EPA later determined that less than one percent of mining waste fails what is known as the EP toxicity test, the regulatory test EPA used for determining whether a waste was hazardous because of hazardous constituents. *See* 51 Fed. Reg. 24496, 24498. EPA thus concluded that Subtitle C regulation over mining and mineral waste processing was, among other things, "environmentally unnecessary" and "unnecessary to protect human health and the environment." 51 Fed. Reg. 24496, 24500.

EPA also completed a comprehensive study of 20 mineral processing wastes in 1990. *See* EPA, *Report to Congress on Special Wastes from Mineral Processing* (1990) (hereinafter "1990 EPA Report to Congress"). Based on the results of that study, EPA issued a final regulatory determination exempting all 20 mineral processing wastes from RCRA Subtitle C regulation. Final Regulatory Determination for Special Wastes from Mineral Processing, 51 Fed. Reg. 27300.[5] The principal reason for this determination was again the low hazard characteristics of the wastes:

> [I]n the absence of a realistic showing of a potential risk and/or documented damages from current management (or in appropriate cases, plausible mismanagement), EPA believes that Congress would not intend

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[4] Even this figure overstates the actual problem because of the conservative testing methodology employed by EPA.

[5] EPA has determined that certain mineral processing wastes (wastes other than the 20 wastes covered by the study), fail to meet the Bevill Amendment's high volume / low hazard criteria. These other wastes are thus no longer protected by the Bevill Amendment and are not at issue in this case.

> to eliminate the special status of these wastes by imposing hazardous waste regulation under RCRA Subtitle C. . . .

Id. at 27305.

In short, the mining industry is unique in several respects. It is an essential industry, both for economic and national security reasons. Its products are both ubiquitous and indispensable. Yet the industry's very nature makes the production of large waste volumes inevitable. Unlike many production-related wastes, however, mining waste poses little threat to human health or the environment. It was for all these reasons that Congress chose to accord mine wastes special treatment -- yet the Ninth Circuit's decision ignores this and consequently poses a threat to the industry *and* to the environmental policies reflected in the federal environmental statutes. At the same time, it shifts regulatory power from the states to the federal government.

B. Remining And Reprocessing Of Mining Wastes.

1. Remining And Reprocessing Of Mining And Mineral Processing Wastes Is Economically And Environmentally Sound.

Remining and reprocessing of mine wastes holds the promise of improving environmental conditions while recovering valuable ore. Estimates of the number of abandoned mining sites in the U.S. range from 100,000 to 400,000 sites. John E. Tilton, *Mining Waste & the Polluter-Pays Principle in the United States, in Mining and the Environment* 57, 63 (Roderick G. Eggert ed., 1994). Old mine waste dumps, tailings ponds and slag heaps are often located in natural drainage areas. Reprocessing these wastes not only reduces any environmental hazards associated with them, but also allows them to be relocated to more appropriate sites. Improvements in technology have made it economically feasible to remine many of these sites and to reprocess the mine wastes at these sites. Indeed, in considering recent proposed amendments to the Clean Water

Act, Congress recognized the importance of encouraging development of these inactive sites:

> Thousands of inactive and abandoned mine sites exist within the United States, some of which are now among the most promising areas for future development. Encouraging exploration and remining of these historical sites would serve two fundamental environmental goals. First, it will significantly improve environmental conditions at these sites by reducing tailings piles and waste rock, and by triggering state reclamation requirements. Second, it may reduce the development of new mining operations in pristine, undisturbed areas.

Water Pollution Prevention & Control Act of 1994, S. Rep. 103-257, 103rd Cong., 2d Sess. (May 10, 1994). Similarly, EPA has suggested reprocessing and reuse of mine waste as a means of reducing environmental harm. *See* EPA, *Mining Waste Management* 3 (September 1991). In short, remining and reprocessing existing mine wastes both preserves virgin land and reduces the hazards associated with abandoned sites -- it is exactly the type of activity the federal environmental statutes were intended to encourage.

2. The Ninth Circuit's Decision Undermines Incentives To Undertake Remining And Reprocessing.

If, as the Ninth Circuit held in this case, the Bevill exemption to CERCLA is a nullity (because of the constituent elements found in mine waste that are ubiquitous in the earth's crust) the risks associated with remining and reprocessing of mine waste are prohibitive. Take, for example, the Midvale site, located south of Salt Lake City. The site has not been operational since 1971 and none of the original mining firms owns any interest in it. The considerable volume of onsite mine waste make the site an attractive site for reprocessing. Yet under CERCLA's strict, retroactive liability scheme, which typically imposes joint and several liability for all response costs at a site, a mining enterprise undertaking reprocessing efforts at

Midvale could face liability for the cost of cleaning up the entire site -- even though by all accounts the remining activity is environmentally beneficial and even though the remining enterprise had no involvement in the original contamination.

The risks associated with such a cleanup effort are difficult to quantify. EPA is considering alternatives for remediating the tailings piles at Midvale. One alternative would cost about $31 million; a second alternative would cost more than $400 million. EPA, *Superfund Program Proposed Plan: Sharon Steel/Midvale Tailings Site* 4 (July 1989). A firm interested in reprocessing waste at Midvale would face the risk not only of cleaning up any problem it might be found to have created, but also of being held liable for the tens or hundreds of millions of dollars in cleanup costs attributable to the activities of others. Faced with risks of this size and risks spanning such a broad range of outcomes, firms understandably will choose to mine new sites rather than undertake remining and reprocessing of existing sites.

The Bureau of Mines has recently recognized this problem and the reasons underlying it:

> Potential liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (Superfund legislation) makes it risky to rework domestic mining properties . . . . Potentially responsible parties (PRP's) are held jointly and severally liable -- one PRP could be held totally responsible for a site, even though several parties were involved in ownership and operation.

Bureau of Mines, *1 Mineral Yearbook 1992* 50 (1993). Similarly, Colorado has identified the obstacles to remining posed by CERCLA:

> In acquiring or operating [existing sites] for further development or mineral recovery, mine owners and operators can incur substantial liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *The present uncertainty*

> *and potential magnitude of this liability may prevent the redevelopment of many mining districts which contain economically recoverable mineral resources.*

Colorado's Policy Regarding Mining & Environmental Cleanup (1987) (emphasis added; copy on file with counsel of record).

> The State is committed to encouraging mining operations that will achieve both economic development and significant environmental improvement. The State recognizes that in many instances the best opportunity for cleanup of old sites within a reasonable time-frame is within the context of their redevelopment.

The Bevill Amendment as applied to CERCLA recognized and accounted for this problem by exempting mining wastes from CERCLA's liability provisions, but the Ninth Circuit's ruling has undermined remining incentives by effectively nullifying the Bevill Amendment. The industry and the environment will suffer as a result.

C. The Ninth Circuit's Ruling Introduces Economic Uncertainty To The Mining Industry.

Even ignoring the problems created with respect to remining and reprocessing of mineral wastes, the Ninth Circuit's decision creates substantial uncertainty in what by all accounts is an essential industry. In passing the Bevill Amendment, Congress recognized the unique characteristics of the mining industry -- specifically, its inevitable generation of large volumes of low hazard waste. Potential CERCLA liability will and has already started to inhibit mining activities.

Mining firms now face, under the Ninth Circuit's ruling, the impossible task of trying to quantify CERCLA risks. This is a problem that uniquely affects the mining industry. If a firm estimates wrong on just one site, given the large volume of waste at any given site, cleanup costs will necessarily be high -- even though the toxicity of the wastes is unusually low. The Midvale site mentioned above illustrates the point: estimates of cleanup costs range from $31 million to more than $400 million. The estimated costs of remediation at the abandoned

mine site in Triumph, Idaho, range from $5 million to $600 million, depending on the method used. Dan Gallagher, *Town Fights Proposal for Superfund Site*, L.A. Times, May 2, 1993, at B5. Faced with such large and uncertain risks, the industry will necessarily forego economically and socially desirable activities. In other words, marginal ore deposits often will be left untapped because of potential CERCLA liability.

The industry will suffer not only because of the uncertainties associated with these costs, but also because it must compete with foreign suppliers -- suppliers that do not face similar regulation. The United States already imports large quantities of minerals; in 1992, the total value of these minerals and mineral products exceeded $34 billion. This country's dependence on foreign sources will only increase if domestic mining firms are saddled with the costs and uncertainties of CERCLA regulation.[6]

D. States Already Regulate Mining And Mineral Processing Waste.

Mining sites are concentrated in a relatively small number of states. More than 90 percent of the mining sites in the dominant mining sectors are located west of the Mississippi; 60 percent are located in just 10 states. 1985 EPA Report to Congress 6-2. As EPA has recognized, to the extent environmental issues arise from mining activities, the key factor in addressing these issues is the particular characteristics of a site. 51 Fed. Reg. 24496, 24498; *see also* 1985 EPA Report to Congress 6-10 (site factors "the single most important aspect").

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[6] Indeed, evidence of this trend can be found in the budgets of U.S. mining firms. Pegasus, a leading U.S. mining firm, estimates that although 80% of its exploration budget was spent on U.S. sites in 1992, only 10% will be spent on U.S. sites in 1995. The remainder will be spent overseas, due in large part to the uncertain environmental liability risks associated with cleanups of historic mining sites.

State governments, the governmental entities closest to and most familiar with these issues, are well positioned to address mine waste regulation, and either have enacted comprehensive mine waste regulatory schemes or have other environmental statutes that can be applied to mining sites.

A comprehensive 1994 legal survey of state mining regulatory programs in 13 western states evaluated 22 different regulatory programs:

Soil Standards	Air Quality
Stabilization	Fish & Wildlife
Sediments, Erosion & Drainage	Inspection
Surface Restoration	Administrative Orders
Vegetation	Surety Forfeiture
Excess Waste	Permit Suspension & Revocation
Sealing	Suit for Damages
Structures	Injunctions
Hydrological Balance	Civil Penalties
Surface Water Quality	Criminal Penalties
Ground Water Quality	Citizen Suits

The study found that all but one of the 13 states had programs covering no less than 19 of the 22 areas studied; several states had programs in every area; and the one state with less than 19 programs had legislation pending that would implement programs which, when combined with existing programs, would provide for regulation of all but one of the study areas. Steven G. Barringer & Kelly A. Johnson, *Survey of State Mining Regulatory Programs in the Western United States* (April 1994) (copy on file with counsel of record); *see also* 1990 EPA Report to Congress, Appendix D-2. In other words, the study found comprehensive state-level mining regulation.

Given that states are better positioned to regulate mining activities and already are doing so, federal intervention is unnecessary and, in many cases, counterproductive. Thus, not only did the Ninth Circuit err in misreading the Bevill exemption in CERCLA, its expansion of federal jurisdiction was entirely gratuitous given the comprehensive state programs already in place.

CONCLUSION

Amici urge this Court to grant the petition for a writ of certiorari. The Ninth Circuit's decision has put the mining and mineral processing industry at grave risk.

Respectfully submitted this _____ day of December, 1994.

By: _____

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